# Kam Mah Theatre Sdn Bhd v Tan Lay Soon

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-285-93
ABDUL HAMID OMAR LP, PEH SWEE CHIN AND EUSOFF CHIN SCJJ
9 NOVEMBER 1993

***Contract*** *— Formation — Subject to contract — Whether specific words required*

***Contract*** *— Construction of terms of contract — 'Usual terms and conditions' — Whether ambiguous*

***Contract*** *— Formation — Subject to contract — Presumption that formal contract necessary*

***Evidence*** *— Documentary evidence — Correspondence — Surrounding circumstances — Whether admissible to show contract not concluded — Whether contrary to ss 91 & 92 Evidence Act 1950 — Evidence Act 1950 ss 91 & 92*

The respondent claimed to have entered into a binding agreement with the appellant for the sale of certain lands ('the land'), relying on a letter ('the said document') addressed from the appellant, as vendor, to the respondent, as purchaser. The terms of the said document contained a proviso, namely, 'that the sale and puchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989', otherwise the deposit was to be refunded to the respondent. A sale and purchase agreement was subsequently prepared and signed by the respondent only, and sent to the appellant's solicitors. The agreement included two new conditions, to which the appellant did not agree, and it therefore refunded the respondent's deposit.

Prior to the hearing of the action in the High Court, the respondent obtained an order for, inter alia: (i) the redemption sum of the land (RM2.48m) to be paid directly to Malayan United Finance Bhd ('the chargee'); and (ii) the titles of the land to be retained in court after their release by the chargee. [See [1992] 2 MLJ 434.] The respondent did, in fact, pay the sum of RM2.48m to the chargee, pursuant to the order. The appellant contended that there was no binding contract and that it was still then negotiating with the respondents. The trial judge found that there was a binding and concluded agreement and ordered specific performance. The appellants have appealed.

**Held**, allowing the appeal:

(1) There was no contract at all, because the said document was dependent on the signing of a formal contract to be further negotiated and approved by both parties. The proviso in the said document was very similar to the phrase or formula of 'subject to contract'. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula.

(2) The words 'usual terms and conditions' failed to reveal certainty and were too ambiguous. What would be the usual terms and conditions remained largely a matter of conjecture, thus the words would create uncertainty unless a contract containing these agreed 'usual terms and conditions' had been signed by the parties.

(3) It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract and it requires cogent evidence to displace this strong presumption. On the facts of this case, there was cogent evidence to show that negotiations were still ongoing between the parties, including: (i) the provision of the return of the deposit on the failure of the parties signing the contract by 18 March 1989; (ii) the agreement which was signed by the plaintiff only, containing two more conditions; (iii) there could have been a further amended draft of the ultimate agreement to take account of withdrawal of the compulsory acquisition over part of the land; and (iv) the correspondence after the date of the said document.

(4) Evidence of surrounding circumstances, background and negotiations between parties is admissible and relevant to show that there was no contract or concluded and binding agreement at all, for ss 91 and 92 of the Evidence Act 1950 merely strike at evidence to contradict, vary, etc, the terms of an established contract, for in that event, such evidence would be unacceptable. Correspondence that passed after the date of the said document was relevant also, for in finding whether there was any contract at all, the court must look at the correspondence as a whole.

(5) The sum of RM2.48m, paid by the respondent to the chargee, was to be refunded by the appellant to the respondent, with interest at 6.5%pa thereon from the date of the respondent's payment of the same to the date of repayment to the respondent, and costs of the appeal and in the court below were awarded to the appellant.

**[Bahasa Malaysia summary**

Responden menuntut bahawa beliau telah mengikat suatu perjanjian mengikat dengan perayu untuk penjualan beberapa bidang tanah tertentu ('tanah itu'), dan bergantung kepada sepucuk surat ('dokumen itu') yang dialamatkan daripada perayu, sebagai penjual, kepada responden, sebagai pembeli. Terma dokumen itu mengandungi suatu proviso bahawa 'perjanjian jual-beli akan menggabung semua terma dan syarat di dalamnya dan lain-lain terma dan syarat biasa dan akan ditandatangani pada atau sebelum 18 Mac 1989', jikalau tidak, deposit akan dipulangkan kepada responden. Suatu perjanjian jual-beli kemudiannya telah disediakan dan ditandatangani oleh responden sahaja, dan dihantar kepada peguamcara perayu. Perjanjian itu mengandungi dua syarat baru, yang tidak dipersetujui oleh perayu dan beliau telah membayar balik deposit responden.

Sebelum pendengaran tindakan itu di Mahkamah Tinggi, responden telah mendapat suatu perintah untuk, antara lain: (i) jumlah penebusan tanah itu (RM2.48 juta) dibayar terus kepada Malayan United Finance Bhd ('pemegang gadaian'); dan (ii) suratikatan hakmilik tanah itu dipegangmilik oleh mahkamah selepas pelepasannya oleh pemegang gadaian. Pada hakikatnya, responden telahpun membayar jumlah RM2.48 juta itu kepada pemegang gadaian mengikut perintah itu. Perayu menegaskan bahawa tidak ada perjanjian yang mengikat dan bahawa ia masih berundingan dengan responden pada masa itu. Hakim perbicaraan telah memutuskan bahawa terdapat suatu perjanjian mengikat dan terbentuk dan memerintahkan pelaksanaan spesifik. Perayu telah membuat rayuan.

**Diputuskan**, membenarkan rayuan itu:

(1) Tidak ada kontrak sama sekali, kerana dokumen itu bergantung kepada suatu kontrak formal yang perlu ditandatangani dan yang perlu dirundingkan lagi dan diluluskan oleh kedua-dua pihak. Proviso di dalam dokumen itu sangat menyerupai ungkapan atau formula 'tertakluk kepada kontrak' ('subject to contract'). Perkataan yang sama dengan perkataan di dalam formula itu tidaklah perlu untuk menimbulkan kesan biasa penggunaan formula seperti itu.

(2) Perkataan 'terma dan syarat biasa' ('usual terms and conditions') gagal mendedahkan kepastian dan adalah terlalu taksa. Apa yang akan merupakan terma dan syarat biasa adalah sebahagian besarnya suatu perkara dugaan, oleh itu perkataan tersebut akan mewujudkan ketidakpastian kecuali jika suatu kontrak yang mengandungi 'terma dan syarat biasa', yang telah dipersetujui, ditandatangani oleh pihak itu.

(3) Adalah mantap bahawa formula 'tertakluk kepada kontrak' menimbulkan anggapan kuat bahawa suatu kontrak rasmi lanjut diperlukan dan bukti yang meyakinkan diperlukan untuk mengalihkan anggapan kuat ini. Pada fakta kes ini, terdapat bukti yang meyakinkan untuk menunjukkan bahawa perundingan masih dijalankan di antara pihak itu, termasuk: (i) peruntukan mengenai pemulangan deposit atas kegagalan pihak menandatangani kontrak itu sebelum 18 Mac 1989; (ii) perjanjian yang telah ditandatangani oleh responden sahaja itu, yang mengandungi dua lagi syarat; (iii) mungkin terdapat suatu lagi draf pindaan perjanjian terakhir untuk mengambil kira penarikan balik pengambilan tanah yang wajib ke atas sebahagian daripada tanah itu; dan (iv) persuratan selepas tarikh dokumen itu.

(4) Keterangan mengenai keadaan sekeliling, latar belakang dan perundingan di antara pihak boleh diterima dan relevan untuk menunjukkan bahawa tidak ada kontrak atau perjanjian yang mengikat dan terbentuk, kerana ss 91 dan 92 Akta Keterangan 1950 hanya terpakai kepada keterangan yang menyangkal, mengubah, dan lain-lain, terma suatu kontrak yang telah

ditubuhkan, kerana di dalam keadaan sedemikian, keterangan seperti itu tidak boleh diterima. Persuratan yang dihantar selepas tarikh dokumen itu juga relevan, kerana untuk memutuskan sama ada terdapat suatu kontrak atau tidak, mahkamah terpaksa melihat persuratan itu secara keseluruhannya.

(5) Jumlah RM2.48 juta yang telah dibayar oleh responden kepada pemegang gadaian, mesti dibayar balik oleh perayu kepada responden, dengan faedah pada kadar 6.5% setahun ke atasnya dari tarikh pembayaran oleh responden hingga tarikh pembayaran balik kepada responden, dan kos rayuan dan di mahkamah bawah diawardkan kepada perayu.]

[*Editorial Note*: In an earlier action, the chargee had applied to remove the respondent's caveat over the land. The application was dismissed by the judge, holding that there was a serious question to be tried as to whether there was a binding contract of sale and purchase in respect of the land. [See [1990] 2 MLJ 482.] The chargee's appeal to the Supreme Court was allowed and the caveat removed. [See [1991] 1 MLJ 504.] Following the disposal of the appeal, the respondent applied to the High Court for, inter alia, an order that the redemption sum of the land be paid directly to the chargee. The application was granted with qualification. [See [1992] 2 MLJ 434.] The appellant appealed to the Supreme Court and the appeal was allowed with costs.]

**Notes**

For cases on ss 91 and 92 of the Evidence Act 1950, see 7 *Mallal's Digest* (4th Ed) paras 635, 1014–1016, 1018-1021.

For cases on formation of contracts, see 7 *Mallal's Digest* (4th Ed) paras 1135-1136.

For a case on the construction of terms of a contract, see 7 *Mallal's Digest* (4th Ed) para 976.

**Cases referred to**

1 *Prenn v Simmonds* [1971] 1 WLR 1381; [1971] 3 All ER 237 (refd)
2 *Hussey v Horne-Payne* (1874) 4 App Cas 311 (folld)
3 *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor* [1981] 1 MLJ 56 (folld)
4 *Winn v Bull* (1877) 7 Ch D 29 (folld)
5 *Derby & Co Ltd v ITC Pension Trust Ltd & Anor* [1977] 2 All ER 890 (folld)
6 *Scammell & Nephew Ltd v Ouston* [1941] AC 251 (folld)

**Appeal from**: Civil Suit No 22–226–89 (High Court, Penang)

*Wong Kim Fatt* (*Christina Chia* with him) (*Christina Chia Ng & Partners*) for the appellant.

*RR Sethu* (*LS Tan & Co*) for the respondent.

**Peh Swee Chin SCJ** (delivering the grounds of judgment of the court): We have allowed the appeal earlier making also certain consequential orders and we now give our reasons.

The appeal arose out of one of those frequent transactions in which parties have negotiated with each other, where one party alleges they have reached a definite binding agreement while the other alleges to the contrary, viz, they were then still negotiating with each other. In the instant case, the learned trial judge found a binding and concluded agreement and we differed, hence the appeal was allowed.

The plaintiff, a solicitor in fact practising under the name and style of LS Tan & Co, claimed specific performance of an agreement for the sale to him of a few pieces of land by the defendant (hereafter 'the said land'), the said agreement had been said to be made by a document in the form of a letter dated 10 March 1989, and addressed to the name of the plaintiff's legal firm (hereafter 'the said document'). It is to be borne in mind that, in all the correspondence and the said document, the name of 'LS Tan & Co' was used instead of the plaintiff's personal name, though in two different drafts of the agreement of sale and purchase to be dealt with later, the plaintiff's personal name was used. Both parties appeared to have tacitly agreed that the use of the name of the legal firm of plaintiff was meant to refer to plaintiff, so it should be so regarded.

The said document dated 10 March 1989 is set out below:

Kam Mah Theatre Sdn Bhd
360 (2nd Floor) Jalan Raja Laut
Tiong Nam Settlement, Kuala Lumpur

Our Ref: YCC/AFY/nbl 10 March 1989

Messrs LS Tan & Co
11 Jalan Cheng Lock
50000 Kuala Lumpur
Attention: Mr LS Tan

Dear Sirs

Lot Nos 1095, 1610 & 1611, Mukim 12, South West District, Penang

This letter serves to confirm that we have agreed to sell the following properties:

| Particulars of title | Pegangan No | Gross area before surrender (sq ft) | Net area after surrender (sq ft) |
|---|---|---|---|
| 1 Perakuan pendahuluan mengenai hak-milik (advance certificate of title) Mukim 12, Daerah Barat Daya, Balik Pulau, Negeri Pulau Pinang | 1095 | 106,412 | 84,961 |
| 2 —seperti di atas— | 1610 | 111,895 | 98,553 |
| 3 —seperti di atas— | 1611 | 125,507 | 17,362 |
| Total | | 343,814 | 200,876 (approx) |

to you as trustee at Malaysian Ringgit Nine (RM9) only per sq ft of the total net saleable area of 200,876 (more or less) sq ft in consideration of your payment of a deposit sum of Malaysian Ringgit Ninety Thousand Three Hundred and Ninety Four and Cents Twenty (RM90,394.20) the receipt of which is hereby acknowledged upon terms and conditions as follows:

1 that the purchase price is at Malaysian Ringgit Nine (RM9) only per sq ft of the net saleable area of 200,876 (more or less) sq ft;

2 that the aforesaid lands shall be free from all encumbrances;

3 that the purchase price shall be paid as follows:

(i) 15% of the purchase price on or before 18 March 1989 (which shall include the 5% paid hereinbefore);
(ii) another 30% of the purchase price on or before 18 April 1989;
(iii) another 30% of the purchase price on or before 18 May 1989; [and]
(iv) another 25% of the purchase price on or before 18 June 1989;

provided that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989 otherwise the aforesaid sum of RM90,394.20 (equivalent to 5% of the purchase price) shall be refunded to you free of interest without demand forthwith;

4 that the vendor's solicitor shall be stakeholder for 5% of the purchase price for the payment of real property gains tax (if any) and the vendor shall provide a bank guarantee to the purchaser's solicitor;

5 that the purchaser's solicitor is authorized to pay the total proceeds of the sale to Malayan United Finance Bhd or any financial institution for the purpose of discharging the aforesaid properties for [the] completion of [the] sale and purchase of the aforesaid properties. In the event that the payment of the aforementioned sum is insufficient to redeem the said properties from the said finance company or any financial institution, then the vendor will pay the additional sum for the purpose of enabling the aforesaid properties to be discharged and redeemed from Malayan United Finance Bhd and/or other financial institution;

6 all payments will be paid in accordance to the schedule above referred to (sic). Any default in payment in accordance to the schedule above written, the vendor is entitled to forfeit the sum equivalent [to] 10% of the purchase price;

7 that each party shall bear their own respective solicitors' cost[s];

8 that all stamp fees and registration fees for the transfer of the properties shall be borne by the purchaser; [and]

9 that the vendor shall bear all incidental charges costs and expenses for securing the discharges of the charges to Malayan United Finance Bhd in respect of the properties.

Yours faithfully
Kam Mah Theatre Sdn Bhd
—Sgd—
Yap Chin Chuan
(Authorized representative)

We will set out the background and circumstances surrounding the said document, including the correspondence that passed between the parties after the date of the said document, all of which we had to consider and did

consider. The relevance or propriety for taking these matters into consideration will be dealt with by us later at a more appropriate and convenient stage. A

On 10 March 1989, the plaintiff, accompanied by PW2, met the authorized representative of the defendant to purchase the said land and they negotiated and, as a result, the said document was drafted and signed by the defendant through its 'authorized representative'. B

On the following day, viz 11 March 1989, with reference to the proviso contained in condition 3 stated in the said document about signing the sale and purchase agreement on or before 18 March 1989, the plaintiff forwarded a draft of such agreement to the defendant's solicitors together with a cheque for RM90,394.20 made out in the name of the said solicitors. The C receipt of this sum was already earlier acknowledged by the defendant in the said document. The learned judge made a finding from the evidence that the cheque was given to the defendant on 10 March 1989. Nothing really turned on this finding, as both parties were relying heavily on other aspects of the case; they seemed to comment on this finding rather D perfunctorily. This court would bear in mind in any event, the fact that this deposit was paid in pursuance of the said document.

On 15 March 1989, the plaintiff wrote to the defendant's solicitors stating they were obliged to point out that the sale and purchase agreement was to be approved and executed on or before Saturday, 18 March 1989.

On 18 March 1989, the plaintiff wrote to defendant's solicitors, enclosing E two cheques to make up the amount of 15% of the purchase price (credit was given to the said sum of RM90,030.20 mentioned earlier in so making up the said amount of the said 15%) as required in condition 3(i) of the said document and also a sale and purchase agreement in quadruplicate which were only and already signed by the plaintiff beforehand and which were F different from the earlier draft agreement in respect of at least two conditions or terms (and which are referred to hereafter as 'the agreement signed only by the plaintiff').

The first difference was that for the first time, the agreement signed only by the plaintiff contained, in cl 3, a requirement of the defendant's solicitors giving a written undertaking 'to secure the registrable discharge of the said G charge'. The charge was referred to in the earlier draft agreement as having been registered against the said land in favour of one 'Malayan United Finance Bhd', the chargee.

The other notable difference was, in cl 17 of the agreement signed only by the plaintiff, which was a new clause about the appointment of a H surveyor to survey the said land with the adjustment in price for any difference found at the same agreed price of RM9 per sq ft, stating that if the defendant did not agree with the survey, that the said land would then be re-surveyed by 'an independent surveyor' to be appointed by the 'mutual agreement' of both parties, etc.

On the same day, the defendant's solicitors wrote to the plaintiff saying I that they would take instructions on cll 3 and 17 mentioned above. The plaintiff further wrote again on the same day to the defendant's solicitors acknowledging the receipt of the latter's letter, asking at the same time: (a) for

A a copy of the 'redemption advice' from the said Malayan United Finance Bhd; and (b) for 'sight of advice of withdrawal notice of (compulsory) acquisition of 6,000sq ft by the authority in question'. This had reference to para 1 of the preamble of the first draft agreement stating that a portion of the said land amounting to 136,938sq ft had been acquired by the state
B government leaving a balance of 206,876sq ft more or less, the latter area being the subject matter of sale.

On 23 March 1989, the defendant's solicitors wrote to the plaintiff stating, on instructions from their clients, that they did not agree to the conditions of the proposed agreement and they refused and refunded all the money the defendant had received from the plaintiff, including the sum of
C RM90,394.20, the receipt of which was acknowledged in the said document.

The finding of the learned judge was that the said document was an enforceable agreement. His Lordship held to the effect that all the terms or conditions other than those stated in the said document were merely usual terms and conditions as referred to in the proviso to condition 3 in the said
D document, as the condition regarding the requirement of undertaking by the defendant's solicitors was not of importance to the contract; the plaintiff and the defendant could be expected to resolve their disagreement on this. About the additional new term concerning survey and adjustment of the price, his Lordship held that it was a usual term and condition (as referred to in the said document) though more significant than the term about the
E requirement of the solicitors' undertaking.

In the event that had happened, the lower court ordered specific performance of the said document and the usual consequential orders and directions.

It ought to be pointed out at this stage that, on 3 January 1991, prior to
F the hearing at the lower court of the action, the lower court made an order on an application made by the plaintiff, after hearing both parties, for the plaintiff to pay 'redemption sums direct to the Malayan United Finance Bhd'; for the titles to the said land after their release by the chargee, to be retained in court; and for all the money and expenses in this connection to be dealt with at the trial. The defendant then appealed to the Supreme
G Court against this order and, at the hearing before the Supreme Court, the appeal against that payment of the 'redemption' sum was withdrawn. A sum of about RM2.48m was in fact paid to the chargee, viz Malayan United Finance Bhd, by the plaintiff pursuant to that order.

The judgment of the lower court was, of course, seriously criticized, as
H to be expected, by the appellant, viz the defendant, and we now deal with our grounds for allowing the appeal.

First, about the propriety of evidence, oral or otherwise of surrounding circumstances, background and negotiations between parties in a case like the instant one, such evidence is admissible and relevant to show that there was no contract at all or in other words, there was no concluded and
I binding agreement at all, for ss 91 and 92 of the Evidence Act 1950 merely strike at evidence to contradict, vary, etc, the terms of an established contract, for in that event, such evidence would be unacceptable. The position generally is the same in England for an established contract, thus,

eg in *Prenn v Simmonds*,[1] Lord Wilberforce said (at p 1385): 'In my opinion, then, evidence of negotiations or of the parties' intentions ... ought not to be received...'. For correspondence that passed after the date of the said document, it was relevant also, for in finding whether there was any contract at all, the court must look at the correspondence as a whole, please see decision of House of Lords in *Hussey v Horne-Payne*[2] (at p 316).

Speaking about such surrounding circumstance in the Privy Council in *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor*,[3] Sir Garfield Barwick said [at p 58]:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question.

Against such background of surrounding circumstances, the said document would have to be considered and construed for its proper meaning and effect, the most important aspect being the proper interpretation of the said document itself. In this connection, a comparison of decided cases will usually yield certain principles sometimes, but often it will not be very helpful and is even apt to lead to confusion.

Looking at the said document, one was struck immediately by a proviso contained therein, a proviso very similar to the phrase or formula of 'subject to contract' which conveyancing lawyers are prone to employ. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula; similar phrase or words would achieve the same result, as shown in numerous past cases. Just to quote one example, in *Winn v Bull*,[4] the words used were: 'subject to the preparation and approval of a formal contract'; they were treated as having the same effect as if the formula of 'subject to contract' were used.

In connection with the proviso contained in condition 3 of the said document, the question arose as to whether that proviso in our view would be equivalent to having the formula of 'subject to contract' inserted in the said document.

First, the proviso, stated as a proviso to condition 3 to which the sale of the said land would be subject, postulated very clearly the making of a sale and purchase agreement that would also include other 'usual terms and conditions'. What would be the usual terms and conditions remained largely a matter of conjecture, thus the words would create uncertainty unless a contract containing these agreed 'usual terms and conditions' had been signed by the parties. Then again, the proviso to condition 3 further stated that the agreement had to be signed on or before 18 March 1989, failing which the deposit of RM90,394.20 would be refunded to the plaintiff free of interest without demand. We were of the view, therefore, that the proviso would have the same effect as if the formula of 'subject to contract' had been in the said document. We now elaborate on the formula.

It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract, 'formal' be it

noted, is not to be understood in the common parlance as being just a 'mere formality' of no importance. As Sir Garfield Barwick who delivered the opinion in *Daiman*[3] said [at p 58]: 'But, in general, employment of the formula "subject to contract" as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations'. We did not think it necessary to set out here a great number of past cases to illustrate such similar effect, and we think that just mentioning one of the more recent cases in addition to the case of *Winn v Bull*,[4] will suffice; that extra case is *Derby & Co Ltd v ITC Pension Trust Ltd & Anor*.[5] From the host of such past cases, the principle is clear, it requires cogent evidence to displace this strong presumption. This court enquired: Was there such cogent evidence?

First, in regard to the payment by the plaintiff of some RM2.48m paid by the plaintiff on behalf of the defendant to the chargee of the said land in order to obtain the release of the titles to the said land, this was not paid at the request, or, with the connivance of the defendant, but it was paid after the plaintiff had obtained the order to do so, the order having been made after hearing the objection to the order from the defendant, who subsequently appealed, but who withdrew the appeal at the last minute, presumably more concerned with chances or lack of prospect of success of their appeal than their agreeability to the idea of the plaintiff paying the sums owing to the chargee in the first place.

The payment of the deposit (RM90,394.20), the receipt of which was acknowledged in the said document, which normally would have been a significant indication, was watered down by the further provision of the return of the deposit on the failure of the parties signing the contract by 18 March 1989. This differed, not without any significance from *Daiman*,[3] in which the booking fee in the booking document for a new house was stated to be liable to be forfeited for failure to sign a later agreement, and in which the Privy Council confirmed, after considering all other matters in the case, that the booking document was a valid contract by itself.

This court considered also that the first draft agreement, before it was even approved by the defendant's solicitors, was followed by the four copies of the agreement signed by the plaintiff only, with the latter containing two more conditions about the solicitors' undertaking and the survey of the land; a situation highly indicative of an ongoing negotiation.

The court considered also that there could even be a further amended draft of the ultimate agreement to take account of withdrawal in respect of about 6,000sq ft, of the compulsory acquisition by the relevant authorities as appeared from some part of the correspondence referred to above. This would seem to exude an air of lack of finality.

The court also considered the starting words of the said document confirming that the defendant had agreed to sell the said land. For the plaintiff to argue with certainty about the finality of these words would be just merely begging the question in view of the proviso discussed above.

The court also considered the correspondence after the date of the said document, again suggesting negotiation.

We were of the view that there was no contract at all, because we found that the said document was dependent on the signing of a formal contract

to be further negotiated and approved by both parties. On this ground alone, we would allow the appeal. There was another ground on which we would have equally allowed the appeal.

That other ground for finding that there was no contract at all was that the words in the said proviso — 'usual terms and conditions' failed to reveal certainty: they were too ambiguous. For example, in *Scammell & Nephew Ltd v Ouston*,[6] the House of Lords was faced with the clause 'that the balance of purchase price can be had on hire-purchase terms over a period of two years'. In that case, Mr Ouston placed an order for purchase of a motor van from Messrs Scammell who accepted the order. The order was in words including the quoted words. Messrs Scammell changed their minds later and refused to sell. The House of Lords held that there was no contract at all, stating that even if the quoted words were considered broadly, they still failed to evince a definite meaning on which the House could safely act. It had transpired from the evidence there that there was a wide variety of hire-purchase agreements.

We therefore allowed the appeal, setting aside the judgment of the lower court with a further order that the sum of RM2.48m or thereabout, paid by the plaintiff to the Malayan United Finance Bhd and further incidental expenses, if not already included therein, be refunded by the defendant to the plaintiff with interest at 6.5%pa thereon from the date of the plaintiff's payment of the same to the date of repayment to the plaintiff, and that there be liberty to apply generally, further with costs here and below to the appellant and for the deposit of RM500 in court to be refunded and paid out to the defendant (appellant).

*Appeal allowed.*

Reported by Prof Ahmad Ibrahim